

qualify, some office employees whose duties compel them to work variable hours could also be in this category. For example, the confidential secretary of a top executive whose hours of work are irregular and unpredictable might also be compelled by the nature of her duties to work variable and unpredictable hours. This would not ordinarily be true of a stenographer or file clerk, nor would an employee who only rarely or in emergencies is called upon to work outside a regular schedule qualify for this exemption.

**§ 778.406 Nonovertime hours as well as overtime hours must be irregular if section 7(f) is to apply.**

Any employment in which the employee's hours fluctuate only in the overtime range above the maximum workweek prescribed by the statute lacks the irregularity of hours for which the Supreme Court found the so-called "Belo" contracts appropriate and so fails to meet the requirements of section 7(f) which were designed to validate, subject to express statutory limitations, contracts of a like kind in situations of the type considered by the Court (see § 778.404). Nothing in the legislative history of section 7(f) suggests any intent to suspend the normal application of the general overtime provisions of section 7(a) in situations where the weekly hours of an employee fluctuate only when overtime work in excess of the prescribed maximum weekly hours is performed. Section 7(a) was specifically designed to deal with such a situation by making such regular resort to overtime more costly to the employer and thus providing an inducement to spread the work rather than to impose additional overtime work on employees regularly employed for a workweek of the maximum statutory length. The "security of a regular weekly income" which the Supreme Court viewed as an important feature of the "Belo" wage plan militating against a holding that the contracts were invalid under the Act is, of course, already provided to employees who regularly work at least the maximum number of hours permitted without overtime pay under section 7(a). Their situation is not comparable in this respect to employees whose duties

cause their weekly hours to fluctuate in such a way that some workweeks are short and others long and they cannot, without some guarantee, know in advance whether in a particular workweek they will be entitled to pay for the regular number of hours of non-overtime work contemplated by section 7(a). It is such employees whose duties necessitate "irregular hours" within the meaning of section 7(f) and whose "security of a regular weekly income" can be assured by a guarantee under that section which will serve to increase their hourly earnings in short workweeks under the statutory maximum hours. It is this benefit to the employee that the Supreme Court viewed, in effect, as a quid pro quo which could serve to balance a relaxation of the statutory requirement, applicable in other cases, that any overtime work should cost the employer 50 percent more per hour. In the enactment of section 7(f), as in the enactment of section 7(b) (1) and (2), the benefits that might inure to employees from a balancing of long workweeks against short workweeks under prescribed safeguards would seem to be the reason most likely to have influenced the legislators to provide express exemptions from the strict application of section 7(a). Consequently, where the fluctuations in an employee's hours of work resulting from his duties involve only overtime hours worked in excess of the statutory maximum hours, the hours are not "irregular" within the purport of section 7(f) and a payment plan lacking this factor does not qualify for the exemption. (See *Goldberg v. Winn-Dixie Stores* (S.D. Fla.), 15 WH Cases 641; *Wirtz v. Midland Finance Co.* (N.D. Ga.), 16 WH Cases 141; *Trager v. J. E. Plastics Mfg. Co.* (S.D.N.Y.), 13 WH Cases 621; *McComb v. Utica Knitting Co.*, 164 F. 2d 670; *Foremost Dairies v. Wirtz*, 381 F. 2d 653 (C.A. 5).)

**§ 778.407 The nature of the section 7(f) contract.**

Payment must be made "pursuant to a bona fide individual contract or pursuant to an agreement made as a result

of collective bargaining by representatives of employees." It cannot be a one-sided affair determinable only by examination of the employer's books. The employee must not only be aware of but must have agreed to the method of compensation in advance of performing the work. Collective bargaining agreements in general are formal agreements which have been reduced to writing, but an individual employment contract may be either oral or written. While there is no requirement in section 7(f) that the agreement or contract be in writing, it is certainly desirable to reduce the agreement to writing, since a contract of this character is rather complicated and proof both of its existence and of its compliance with the various requirements of the section may be difficult if it is not in written form. Furthermore, the contract must be "bona fide." This implies that both the making of the contract and the settlement of its terms were done in good faith.

**§ 778.408 The specified regular rate.**

(a) To qualify under section 7(f), the contract must specify "a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 6 (whichever may be applicable)." The word "regular" describing the rate in this provision is not to be treated as surplusage. To understand the nature of this requirement it is important to consider the past history of this type of agreement in the courts. In both of the two cases before it, the Supreme Court found that the relationship between the hourly rate specified in the contract and the amount guaranteed was such that the employee in a substantial portion of the workweeks of the period examined by the court worked sufficient hours to earn in excess of the guaranteed amount and in those workweeks was paid at the specified hourly rate for the first 40 hours and at time and one-half such rate for hours in excess of 40 (*Walling v. A. H. Belo Company*, 316 U.S. 624, and *Walling v. Halliburton Oil Well Cementing Company*, 331 U.S.17). The fact that section 7(f) requires that a contract, to qualify an employee for exemption under section 7(f), must specify a "regular rate," indicates that

this criterion of these two cases is still important.

(b) The regular rate of pay specified in the contract may not be less than the applicable minimum rate. There is no requirement, however, that the regular rate specified be equal to the regular rate at which the employee was formerly employed before the contract was entered into. The specified regular rate may be any amount (at least the applicable minimum wage) which the parties agree to and which can reasonably be expected to be operative in controlling the employee's compensation.

(c) The rate specified in the contract must also be a "regular" rate which is operative in determining the total amount of the employee's compensation. Suppose, for example, that the compensation of an employee is normally made up in part by regular bonuses, commissions, or the like. In the past he has been employed at an hourly rate of \$5 per hour in addition to which he has received a cost-of-living bonus of \$7 a week and a 2-percent commission on sales which averaged \$70 per week. It is now proposed to employ him under a guaranteed pay contract which specifies a rate of \$5 per hour and guarantees \$200 per week, but he will continue to receive his cost-of-living bonus and commissions in addition to the guaranteed pay. Bonuses and commissions of this type are, of course, included in the "regular rate" as defined in section 7(e). It is also apparent that the \$5 rate specified in the contract is not a "regular rate" under the requirements of section 7(f) since it never controls or determines the total compensation he receives. For this reason, it is not possible to enter into a guaranteed pay agreement of the type permitted under section 7(f) with an employee whose regular weekly earnings are made up in part by the payment of regular bonuses and commissions of this type. This is so because even in weeks in which the employee works sufficient hours to exceed, at his hourly rate, the sum guaranteed, his total compensation is controlled by the bonus and the amount of commissions earned as well as by the hourly rate.

(d) In order to qualify as a "regular rate" under section 7(f) the rate specified in the contract together with the